The Legalization of Politics in Canada

Andrew Cross
The University of Calgary
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The entrenchment of a Charter of Human Rights in Canada has created another source of policy making in Canada alongside Parliament. Supreme Court Justice Antonio Lamer has described this change as a "legal revolution" and compared it to the invention of penicillin. Others are more ambivalent. There is no doubt that the Charter has injected a new form of political discourse in which citizens can contest a law on the basis of some "right, privilege or other entitlement." (Monohan, 107)

The Charter is the culmination of a gradual shift away from a British towards an American conception of how our courts should relate to our representative government. The British conception was one of absolute Parliamentary sovereignty in which Parliament made the law and the courts applied it. Under this system courts still had a great deal of flexibility to interpret the law. However, the evaluation of legislation based on its merits was "strictly speaking, beyond the power of the courts." (Mandel, 6) The American conception of the role of the Supreme Court was much different. The American Constitution was seen as a means of protecting property "against the levelling tendencies of democracy". (Mandel, 7) Thus the American Constitution actually *entrenched* slavery by guaranteeing that Congress would not be able to rule against the importation of slaves and made provisions for the repatriation of runaway slaves back to the slave states. Central to the formation of the Constitution was the conflict between creditors and debtors which culminated in Shays rebellion. In a letter to George Washington, one advocate of the Constitution described a scene in which 12 to 15,000 desperate men stormed

courthouses and burned records. He urged Washington that, “Our government must be braced , changed, or altered to secure our lives and property.” (Mandel, 8) Traditionally, the Supreme Court in the United States defended laisezz-faire capitalism and the interests of business. It wasn’t until Franklin Roosevelt chastened the courts in 1937, after the Supreme Court attempted to block social welfare laws in response to the Great Depression, that the Supreme Court began to shift its focus towards defending equality rather than economic rights. The Canadian Supreme Court proved to be equally resistant to social welfare programs, rejecting Bennett’s version of the New Deal.

WW2 resulted in a heightened awareness of the importance of human rights. The Supreme Court in Canada began to exercise more influence in the legislative arena beginning with its opposition of Social Credit policies intended to regulate banks and later overruled laws enacted by the Duplessis government. In B.C. Judge O’Halloran advocated for the creation of a Bill of Rights as a way of resisting the influx of “Marxian Communist’s.” He was also concerned by the increased power of government over the lives of its citizens. Regulatory tribunals established by the civil service during WW2 existed outside of the court system and were considered by O’Halloran to be a danger to the freedom of the individual. He argued that, “No Canadian can rest content unless he is convinced that his citizenship as such guarantees to him constitutionally equally full rights as are enjoyed by his friends and neighbours in the United States of America.” (Mandel, 14)

Diefenbaker made a Canadian Bill of Rights a part of his platform in 1959. It is important to note however, that this bill was federal rather than provincial. The 1950’s and 60’s saw a proliferation of Provincial Human Rights Codes enforced by Human Rights Commissions.

These commissions consisted of non-lawyers and were given the power to impose fines and injunctions but had no veto power over legislation.

The year 1967 was the catalyst for the entrenchment of constitutional rights in Canada. Forces in Quebec had reacted to the oppressive Duplessis policies resulting in the Quiet Revolution of 1960-66. With the modernization of Quebec came an increasingly vocal middle class that was highly educated and viewed elites at the top of Anglo corporations as a barrier to their progress. The result was the rise of two major groups within Quebec that sought to channel Quebec nationalism towards different ends. One camp, represent by Rene Levesque, sought independence. The other, represented by Pierre Trudeau, sought to create a truly bilingual nation in which Quebecers were free to migrate and participate in the economy. As the separatist movement in Quebec gained momentum, Trudeau believed that Canada needed to become a "truly pluralistic and polyethnic society" (Bliss, 251) Only if English Canadians were willing to give up some of their own aspirations of what Canada should look like would French Canadians be willing to meet them half way.

However, the government could not enact legislation that would make Canada a "truly bilingual country" without making an amendment to the constitution. To make such an amendment, Trudeau needed the consent of the provinces, which was unlikely. Trudeau saw the increasing popularity of the Bill of Rights as "an expedient, as a means to break the log jam of constitutional reform, which was itself just an expedient to his goal of entrenched bilingualism." (Mandel, 21) Amid discussion of an entrenched charter, the *Drybones* case revealed an increasing willingness by the courts to overturn law. Joseph Drybones had been charged $10.00 for drunkenness off the reserve. The liquor laws contained in the "Indian Act" were more prohibitive than general liquor laws that prohibited public drunkenness because they could apply

to both public and private places. Territorial Court Judge William G. Morrow appealed the ruling and heard the case himself. He declared the section of law "inoperative" because it was "contrary to the Canadian Bill of Rights" (Mandel, 23)

Another significant step towards entrenchment was the appointment of Bora Laskin to the Supreme Court in 1970. Laskin had proven himself to be a centralist who believed in judicial review. In 1975 the Supreme Court Act was amended to give courts more control over cases. The court would decide if a case was of sufficient 'public importance.' The Supreme Court was no longer a court of higher appeal between parties with private disputes. "Now, any taxpayer could challenge a laws constitutional validity even if they had not specially effected by the law". (Mandel, 24)

The election victory of the PQ in 1976 and the enactment of Bill 101 that enforced unilingualism in Quebec allowed Trudeau to respond with Bill C-60 that opened the door to entrenchment. Although the Liberals lost the election in 1979 they were quickly returned to power in 1980 providing Trudeau the mandate necessary to push through entrenchment. Ironically, the place where the battle over the Charter was fought was in the Supreme Court over a period of five days in April in which the Supreme Court decided if the enactment of the Charter required the approval of all the provinces. Trudeau was opposed by Tories who contended the provincial sovereignty was threatened by the Charter. The Court decided that the Charter could be legally enacted without unanimous consent from the provinces. The way was cleared for the First Ministers meeting in November 2, 1981 where an accord was reached that excluded Quebec. An important element that helped pave the way for the Charter was the inclusion of a 'not withstanding' clause that gave provinces the power to veto Supreme Court rulings. Trudeau made sure, however, that language rights were beyond the reach of s. 33. On the signing of the

accord, Trudeau expressed his hope for the unifying influence of the Charter on Canada, He said, "Essentially we will be testing – and hopefully, establishing – the unity of Canada." (Dryedn, 34) According to Trudeau, the Charter was the "common thread that binds us together." (Dryden, 34)

The entrenchment of the Charter resulted in significant changes in the number and type of cases heard by the Supreme Court. During the 1960's to around 1973 the court regularly heard about 120 cases divided almost equally between private and public cases. From 1974 to 1980, the court began to devote more time to constitutional law. By the mid 1980's the number of private versus public cases had changed drastically. For example, by 1984 the ratio was almost 1 to 5 in favour up public law. With this change came an increase in the media attention given to the Supreme Court. For example, the number of stories reported in the 'Globe and Mail' that involved the Supreme Court increased from 330 in 1979 to 512 in 1985. (Monahan, 20-21) The reason for this increased attention given by the media is that court was making decisions that had a significant impact on Canadian society. The Charter had given the courts "a substantive policy role, one that was previously reserved to Parliament." (Bryden, 24)

One example of this increased power can be seen in the *Moregantaler* case. In 1969 the laws on abortion where relaxed somewhat to allow for 'therapeutic' abortions that were vetted by a 'therapeutic abortion committee' or TAC. Essentially, abortion decisions were left to a hospital's discretion. They had the power to carry out an abortion if "the pregnancy where likely to endanger life or health." (Mandel, 408) Hospitals were not required to set up TAC's making access to an abortion difficult. Henry Morgentaler began to offer abortions in a special clinic and without a certificate from a TAC. Despite some time spent in jail, Morgentaler was

eventually able to set up a clinic in Montreal under a PQ government that came to power in 1976 with the promise that it would not enforce the abortion laws in the Criminal Code.

As the charter was drafted, both pro-life and pro-choice lobby groups sought to ensure that the Charter worked in the favour of their cause. Pro life groups wanted to see a section of the Charter dedicated to women's reproductive rights. If this could not be gained then they sought an amendment that stated, "Nothing in this Charter affects the authority of parliament to legislate in respect of abortion," (Mandel, 407) The motion was defeated after Trudeau assured MP's that "the Charter is absolutely neutral on this matter." (Mandel, 407) If a judge did rule that the Charter was applicable to "certain provisions of the Criminal Code" then provinces had recourse to the not-withstanding clause. (Mandel, 407) In 1983 Morgentaler opened clinics in Ontario and Manitoba and was charged a second time for "conspiracy to procure abortions." His case eventually came before the Supreme Court where it 'smouldered' for two years before the courts released their decision in favour of striking down the Abortion Law of 1967. Five judges were in favour and three against. The majority opinion argued that the abortion laws, "limited and delayed access to abortions even where they were necessary for health reasons." (Mandel, 411) Moreover Justices Dickson and Lamer wrote that it was against a women's "security of person" to force her, " to carry a baby to term contrary to a woman's own wishes under the threat of criminal punishment." (Mandel, 412) Noticeably absent from their discussion was any discussion of the "rights of the foetus". Chief Justice Dickson and Lamer argued that the women's life and health were "paramount" and that the court was not obliged to "evaluate any claim to "foetal rights". (Mandel, 412) Their goal was ensure that the objectives of the abortion law of 1969 as expressed by Parliament was fulfilled; to ensure that lawful abortions are safe and to ensure that the excuse of 'therapy' would not be abused. But where these really the objectives

of the law passed by Parliament? The decision by Parliament to give hospitals the freedom to choose not to offer abortions, though limiting access, was made to ensure that 'freedom of conscience' would not be violated. Similarly, the decision to limit access to only a few hospitals approved by the provinces was because, in the words of one MP, "it was found in the United States that some doctor committees have after a certain time fallen into routine and when an abortion case came up... the foetus was killed and the papers were signed..." (Mandel, 415) Mandel makes a fair critique when he argues that the court was "striking their own balances and pursuing their own objectives by ignoring certain aspects of the law and emphasizing others." (Mandel, 415)

The Charter brought us into another world, a world in which unelected official, often influenced by special interest groups and lobbies, can strike down laws voted by duly elected governments. It has given rise to a court party that does not seek to influence voters but judges. These special interest groups have had some significant successes. For example, the ruling made by Quebec's Commission on Human Rights that granted an autistic child the right to be taught, at public expense, by a personal teaching assistant in a regular classroom on the ground that "it was better for his development and that he needed to make friends. (Dryden, 49) The decision was made without public discussion by educators or input from taxpayers. The Charter has transformed the political process by giving to courts the power of judicial review.

So what exactly is judicial review? Monahan defines it as the process which "involves unelected judges overturning the will of a democratically-accountable legislature on the basis of open-ended and abstract constitutional guarantees" (Monahan, 24) As noted earlier, the role of the judicial system in American politics has traditionally been to protect "the rights of individuals against the collectively." (Monahan, 29) Canadian courts have traditionally shunned this role of

balancing interests. In Supreme court ruling, *Harrison v. Carswell*, Dickinson writes that "interest balancing" must "by their very nature, be arbitrary and embody personal economic and social beliefs" (Monahan, 30) One of the cornerstones of Canada's legal creed has always been the distinction between the realms of law and politics and the supremacy of Parliament, "subject only to federalism issues dealing with the proper allocation of power." (Monahan, 30) However, with entrenchment of a Charter, there is no longer only one locus that bears responsibility for policy decisions. Former Prime Minister Kim Campbell argues that it is no longer debatable, "whether the courts are 'making policy' but rather the appropriate limits of the courts policy-making role." (Campbell, 25) Campbell further acknowledges "a very disquieting trend among legislators to leave difficult decisions to the courts." (Campbell, 29) There is a obvious reason for this. One legislative body is elected and the other isn't. Campbell goes on to tell us why the courts should not supplant Parliament. Court cases are about specific situations and are inappropriate for making broad policy decisions that affect everyone. Moreover, the adversarial nature of the judicial process is such that there is a clear winner and loser whereas the legislature allows for "finely crafted compromises" (Campbell, 26) There is an increasing amount of 'rights talk' which according to American legal scholar, Mary Ann Glendon, is "the language of no compromise" (Simpson, 57) Simpson outlines some examples of 'rights talk'. Opposition to government cuts to ViaRail was opposed on the grounds that Canadians had a 'right' to a national rail service. Canadians in remote cities say they have a right to air service from Air Canada. Canadian fishermen have a 'right' to fish stocks. Smokers have a right to smoke and non-smokers have a right to clean air. (Simpson, 58) By turning competing 'interests' into 'rights', the Charter has made Canada an increasingly litigious society. Some have identified this transformation as the 'Americanization' of our political culture.

Defenders of the Charter argue that the courts role is to interpret the constitution objectively and apply its standards to legislation. “The question of the constitutional validity of legislation is totally separate and distinct from the question of the wisdom or merits of that legislation.” (Monahan, 31) The court is much more likely to implement the Charter in cases involving the review of the conduct administration officials rather than the review of statutes that are a product of legislation. It can be argued that this form of judicial review enhances democracy by giving citizens the ability to challenge the power of a bureaucracy often given to corruption. However, as Monahan points out, courts already had the ability to charge bureaucrats that operate outside of the boundaries of authority established by legislation without any need to appeal to the Charter.

It has also been argued that the courts deal with ‘facts’ and operate in the realm of reason where as politics deal with ‘values’ and the “irrational working out of conflicting desire and opinion.” (Monahan, 56) An example of the perceived fact / value dichotomy can be seen in case, *Operation Dismantle.* The plaintiff sought to ban the testing of cruise missiles on the basis that such testing increased the likelihood of a nuclear war. Dickinson wrote the majority opinion on the case, denying the plaintiff on basis of lack of “causation”. The causal link between the actions of the government and the violation of the plaintiffs rights was “simply too uncertain, speculative and hypothetical to sustain a cause of action.” (Monahan, 57) Interestingly enough, Dickenson did not reject the case on the basis that it was political matter. He writes, “I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts.” (Monahan, 57)

This case reveals the underlying philosophy behind judicial review: it is legitimate only in claims “which are capable of proof in an objective manner.” (Monahan, 58) The Operation Dismantle

case was clearly political in nature yet the reason given by the court to dismiss the case was that it lacked causation rather than it being outside of the court's jurisdiction to judge the wisdom of legislation.

The Charter in Canada has given rise to the emergence of the 'court party'. F.L. Morton and Rainier Knopff argue that the emergence of court politics marks a transition in the history of our democracy that is as significant as the shift in power from the King to the House of Lords and from the House of Lords to the House of Commons. Furthermore, Morton and Knopff contend that, "Judicial review has lost its traditional character as a conservative check on democratic change. It is no longer portrayed as a way of defending traditional rights, but as an instrument for social and political reform." (Morton and Rainier, 62) By all appearances, it appears that that institution that was established as a means of safeguarding the property rights of individuals may end up being the means of depriving it for as Simpson points out, "The weakness of the judiciary in balancing competing claims, especially on the public purse, is perhaps of little consequence in an age of munificence. It can become increasingly burdensome in an age of distinctly limited government resources." (Simpson, 59)

References

Ajzenstat, J., Ed. Canadian Constitutionalism: 1791-991. Canadian Study of Parliament Group, 1991. Ottowa.

Bryden, P., S. Davis, et al. (1994). Protecting rights and freedoms : essays on the Charter's place in Canada's political, legal, and intellectual life. Toronto ; Buffalo, University of Toronto Press.

Rt. Hon. Kim Campbell, "Parliament's Role in Protecting the Rights and Freedoms of Canadians" in Bryden, P., S. Davis, et al. (1994). Protecting rights and freedoms : essays on the

Charter's place in Canada's political, legal, and intellectual life. Toronto ; Buffalo, University of Toronto Press.

Mandel, M. (1994). The Charter of Rights & the legalization of politics in Canada. Toronto, Thompson Educational Pub.

Monahan, P. (1987). Politics and the constitution : the charter, federalism, and the Supreme Court of Canada. Toronto, Carswell.

Simpson, Jeffrey “Rights Talk: The Effect of the Charter on Canadian Political Discourse” in P., S. Davis, et al. (1994). Protecting rights and freedoms : essays on the Charter's place in Canada's political, legal, and intellectual life. Toronto ; Buffalo, University of Toronto Press.